UNITED NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 723

Case No. 743: BENTALEB

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Mikuin Leliel Balanda;

Whereas, on 15 July 1993, Mokhtar Bentaleb, a staff member of the United Nations, filed an application requesting the Tribunal:

"[To order the production of certain documents, and]

(a) To find that Respondent has failed to implement Judgement No. 539 of the Administrative Tribunal;

(b) To order that Applicant's name be added to the 1992 P-5 Promotion Register and that he be promoted, as of 1 April 1992, to a P-5 post either in his present department or in another department;

(c) To award Applicant compensation, in the amount of two years' net base salary, for the continued violation of his rights by Respondent in disregard of Judgement No. 539 of the Administrative Tribunal;

(d) To award Applicant counsel's fees in the amount of $3,000."

Whereas the Respondent filed his answer on 5 August 1994;

Whereas the Applicant filed written observations on 31 May 1995;

Whereas, on 30 June 1995, the Tribunal put questions to the Respondent, to which he provided answers on 5 and 12 July 1995;

Whereas, on 19 July 1995, the Applicant commented thereon;

Whereas, on 21 July 1995, the Respondent submitted a further statement and the Applicant commented thereon on 25 July 1995;

Whereas, on 27 July 1995, the Respondent submitted a further statement;

Whereas, on 2 August 1995, the Tribunal informed the parties that it had adjourned its consideration of the case until its next session and put a further question to the Respondent;

Whereas, on 15 September 1995, the Respondent submitted his answer to the question put by the Tribunal and requested the Tribunal to defer consideration of the case, and on 10 October 1995, the Applicant provided comments thereon;

Whereas, on 30 October 1995, the Tribunal put a question to the Respondent to which he provided an answer on 2 November 1995;

Whereas, on 5 November 1995, the Applicant commented thereon;

Whereas, on 6 November 1995, the Tribunal informed the parties that it has decided to consider the case at its current session;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 1 November 1971, as an Associate Administrative Officer at the P-2 level, in the Training Service of the Office of Personnel Services. He served under a succession of fixed-term appointments until 1 July 1973, when he received a probationary appointment. On 1 April 1974, he was granted a permanent appointment and promoted to the P-3 level, as Administrative Officer. On 1 February 1977, the Applicant was reassigned as Recruitment Officer to the Technical Assistance Recruitment Service, Division of Recruitment. On 1 July 1977, he was promoted to the P-4 level. On 1 July 1978, he was transferred

to the Technical Assistance Recruitment and Administration Service, Department of Technical Co-operation for Development (TARAS/DTCD).

On 29 June 1990, the Applicant filed an application with the Tribunal challenging his non-inclusion in the 1986 P-5 Promotion Register. On 4 November 1991, the Tribunal issued Judgement No. 539. It found that in the departmental review, the Applicant "did not receive the full, fair and objective consideration to which he was entitled". The Tribunal held as follows:

> "XXIX. Since the Tribunal has concluded that the Secretary-General's exercise of discretion in disapproving the recommendation of the Appointment and Promotion Board for the Applicant's promotion was flawed for the reasons stated above, the Tribunal trusts that the Applicant will now receive from the Respondent the full and fair consideration to which he is entitled for promotion, at the earliest possible date, to a vacant P-5 post for which he is qualified, particularly in view of the unfair treatment to which he was subjected."

On 28 May 1992, a "Special Report" concerning the Applicant was sent from the Chief, TARAS/PSD[Programme Support Division]/DESD [Department of Economic and Social Development] to the Assistant Secretary-General, Office of Human Resources Management[1] (OHRM). In this report, the Chief, TARAS, stated: "I have found myself unable, in good conscience, to recommend a Within Grade Salary Increment ..." He noted that the Applicant's performance "has been causing serious problems in TARAS for a long time," and that in the past year "the decline in his performance" had been such as to force the Department to relieve him of certain functions.

On 31 July 1992, the Applicant submitted a rebuttal to the Special Report. He stated, inter alia, that the Special Report "must be viewed against the background of Judgement No. 539". He noted that the staff member who originated the Special Report was

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[1] Successor of the Office of Personnel Services.

the staff member whose lateral transfer had been criticized by the Administrative Tribunal in its judgement. He also stated that his most recent performance evaluation report (PER), covering the period from 1 February 1987 to 31 December 1990, had been withheld from him.

In the meantime, in a letter dated 16 June 1992, the Applicant requested the Secretary-General to "review the continuing disregard by the Department of Economic and Social Development (DESD) of Judgement No. 539 ..." He specified three administrative decisions as a manifestation of this disregard: (1) the transfer of a vacant P-5 post out of TARAS; (2) that his PER from the period 1987-1990 continued to be withheld from him; and (3) that a vacant P-5 post in TARAS had been filled through the transfer of a P-4 staff member from Geneva. The Applicant requested that these decisions be rescinded. On 1 September 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

On 29 October 1992, the Applicant signed his PER covering the period through 1990. On 27 November 1992, he instituted a rebuttal to his PER.

The JAB adopted its report on 3 May 1993. Its considerations and recommendations read, in part, as follows:

> "Considerations
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> ...
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> 21. The Panel had to consider whether Appellant had received full and fair consideration. Germane to this case, however, is the fact that the appellant is entitled to an evaluation of his performance in a timely manner as provided in ST/AI/240/Rev.2. The Panel considered that the failure of the Respondent to do so constitutes non-observance of the Appellant's terms of employment and, in this case, one which seriously jeopardizes his chances for promotion - thereby rendering the 'trust' which the UNAT reposed in the Respondent, misplaced.
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> ...

24. The Panel first examined the Special Report which was prepared and signed by [...], Chief, TARAS, Programme Support Division (PSD), DESD [Department of Economic and Social Development]. The Panel found that, contrary to para. 16 of ST/AI/240/Rev.2, which stated that Special Report 'shall be made by the head of the department or office ...', the report was signed by [the Chief, TARAS/PSD/DESD] who is at the level of Chief of Service. The Panel felt, therefore, that the validity of the Special Report was questionable.

25. The Respondent had made the Special Report available to the JAB and the APB in order to indicate that the Appellant was fairly considered for promotion; however, his Department was dissatisfied with his performance. The Panel questioned the good faith of the Respondent by placing the above material before it. The Panel noted that since ST/AI/240/Rev.2 provides for a rebuttal procedure for special reports, even when the validity in preparing such reports is questionable and the process is not complete, it is not appropriate for the JAB to consider the substance of such an evaluation.

26. The Panel considers fair treatment to be part of Appellant's conditions of employment. It felt that these had been violated when the Respondent acted unfairly by submitting the Special Report to the JAB and the appointment and promotion bodies. The Panel noted that UNAT had held that staff members are entitled to fair treatment by the Organization (see Judgements No. 427, Raj and No. 442, Motamedi).

Recommendations

27. The Panel noted that Appellant's rebuttal on the Special Report was submitted on 31 July 1992 and that, so far, the Appellant has not yet received the list of proposed members of the rebuttal panel. The Panel considers this situation unacceptable and recommends that the Respondent take measures to allow the rebuttal investigation process to start immediately.

28. The Panel noted that the Special Report is not a substitute for the regular PER. Therefore, the Panel considered that the Appellant's latest PER, together with the results of the rebuttal, and the appraisal by the Head of the Department, were vital to the Appellant's receiving full and fair consideration by the appointment and promotion bodies. It, therefore, recommends that the complete documents of the Appellant['s] evaluation be placed before the appointment and

promotions body before it completes its consideration of the 1992 P-4 to P-5 promotion exercise in the Department of Economic and Social Development.

29. The Panel further recommends that, pending completion of the report of the rebuttal panel and its appraisal, the Special Report and the late PERs, be expunged from the Appellant's file.

30. The Panel makes no other recommendation in support of this appeal."

On 26 May 1993, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and informed him that the Secretary-General had decided to accept the following recommendations:

"(i) The rebuttal investigation process start immediately;

(ii) The complete documents of your evaluation be placed before the appointment and promotion body before it completes its consideration of the 1992 P-4 to P-5 promotion exercise;

(iii) Pending completion of the regular report by the rebuttal panel and its appraisal by the Head of the department, the Special Report and the late PERs be expunged from your file."

On 15 July 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent failed to implement Judgement No. 539 by holding up his PER and then failing to investigate his rebuttal of the report, and by issuing a Special Report and failing to investigate his rebuttal to that report.

2. At no time in the past did the Respondent question the quality of the Applicant's performance. The real motive for a

sudden change in attitude by the Respondent towards the performance of the Applicant was a desire to avoid implementation of Judgement No. 539.

Whereas the Respondent's principal contentions are:

1. The Respondent has implemented Judgement No. 539 by giving the Applicant full and fair consideration for promotion.

2. The Applicant has failed to establish his allegations of bad faith and/or prejudice in the Respondent's implementation of Judgement No. 539.

3. The Applicant is not entitled to promotion.

The Tribunal, having deliberated from 29 June to 25 July 1995 in Geneva and from 10 October to 21 November 1995 in New York, now pronounces the following judgement:

I. The Applicant claims that UNAT's Judgement No. 539 has not been duly implemented by the Respondent. In Judgement No. 539, the Tribunal expressed its trust that the Applicant would receive "the full and fair consideration to which he is entitled for promotion, at the earliest possible date, to a vacant P-5 post for which he is qualified". The Applicant claims that he was not considered for the two posts which he alleges became vacant in his Department after Judgement No. 539 was rendered. He also claims that he was not duly considered by the Appointment and Promotion Board (APB) during the 1992 promotion review exercise. His main argument, in this respect, is that his latest performance evaluation report (PER) was withheld by the Administration in order to avoid placing it before the APB during the promotion review exercise.

II. The Tribunal wishes to recall at the outset that the recommendation included in its Judgement No. 539 in no way indicates that the Applicant should be considered for any given P-5 post on a priority basis or in a preferential way. The Tribunal's request was aimed exclusively at ensuring that the staff member would receive the same full and fair consideration for promotion to which all staff members are entitled.

The Tribunal also wishes to recall that staff members are not entitled to promotion. Their merits are appreciated freely by the relevant bodies of the Administration, albeit with due respect to the existing rules and regulations.

III. Having examined the evidence submitted to it, the Tribunal notes irregularities in the 1992 promotion review exercise that amount to a denial of the Applicant's right to be fully and fairly considered.

IV. The Tribunal notes that the Applicant's PER, covering the 1987-1990 period of service, was only completed in July 1992. Parts I through III of the PER are dated December 1990, but parts IV and V bear the date of October 1992. The Applicant instituted rebuttal proceedings in November 1992 but the process only commenced in May 1993, at the earliest.

As a consequence of these delays, when the 1992 Promotion review exercise began in January 1993, the Applicant's PER could not be placed before the APB because the rebuttal procedure was still under way. The rebuttal procedure was concluded in November 1994, many months after the promotion review exercise was over. The outcome was favourable to the Applicant, whose performance was upgraded to a "very good performance". Had the PER been prepared on time and had the rebuttal process been completed on time, the APB would have had a current satisfactory PER before it when reviewing

the Applicant. But this, of course, does not mean that the Applicant would have been deemed one of the best qualified candidates for the limited number of vacancies.

V. The Tribunal is not persuaded by the Applicant's allegations that the delays were due to a wilful design aimed at harming his career. There is, however, the possibility that the Applicant's career prospects suffered from these delays.

The Respondent claims that the delay in completing the Applicant's PER was partly his own fault, as he, for some time, refused to sign it. This could account for the period from July 1992, when the PER was completed, to October 1992, when it was finally signed by the Applicant. Nevertheless, the delay of 18 months from December 1990 to July 1992, does not appear to have been caused by any negligence on the part of the Applicant. The Administration should therefore be held responsible for it.

The Tribunal concludes that due to the Administration's delays, the Applicant could not have been fully and fairly considered by the APB.

VI. According to the record, among the reasons that led to the Applicant's non-inclusion in the 1992 Promotion Register were problems with his performance. The Tribunal notes that there was no valid documentary evidence indicating the existence of such problems. The only documents before the APB that alluded to the Applicant's unsatisfactory performance were the rebutted PER and the Special Report submitted in connection with the withholding of the Applicant's within grade salary increment. As both documents were being rebutted, they could not be relied on in the promotion review exercise, until the rebuttal process was concluded.

According to the letter dated 26 May 1993, from the Under-Secretary-General for Administration and Management to the Applicant, the Secretary-General decided that the complete documents

concerning the Applicant's "evaluation be placed before the APB before it completes its consideration of the 1992 P-4 to P-5 promotion exercise". In this way, the Secretary-General sought to ensure that the review of the Applicant by the APB would take place only when the rebuttal procedure had finished and all relevant documents in their final form had been made available to it. Nevertheless, the Applicant was reviewed by the APB in the absence of the "complete documents" required by the Secretary-General.

VII. For the foregoing reasons, the Tribunal finds that the Applicant was not fully and fairly considered during the 1992 Promotion Review Exercise and that, therefore, Judgement No. 539 was not duly implemented.

VIII. The Applicant further alleges that, prior to the 1992 Promotion Review Exercise, he was not fully and fairly considered for two vacant posts that were available in 1991. The Respondent contends that there was only one post available in 1991, since the other was placed at the disposal of the Secretary-General.

The Tribunal will not enter into whether this second post was or was not available. In connection with the remaining post, the Tribunal finds that the absence of a PER also affected the Applicant's prospects.

IX. The Tribunal therefore concludes that Judgement No. 539 was not duly implemented with respect to the 1992 Promotion Review Exercise. It reiterates the necessity of fully and fairly considering the Applicant as ordered in its Judgement. For this he is entitled to compensation which the Tribunal assesses at US$1,000.00.

X. The Tribunal emphasizes, however, that this proceeding, which deals solely with procedural irregularities associated with the

implementation of Judgement No. 539, concerning consideration for promotion, is wholly without prejudice to the position of either the Applicant or the Respondent concerning substantive matters regarding disputed issues of fact relating to the Applicant's performance.

XI. Accordingly, the Tribunal orders the Respondent to pay to the Applicant US$1,000.00.

All other pleas are rejected.

(Signatures)

Jerome ACKERMAN
President

Luis de POSADAS MONTERO
Vice-President

Mikuin Leliel BALANDA
Member

New York, 21 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary